YTS Architecture Sdn Bhd v Oxley Treasure Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22C-2–01 OF 2021
LIM CHONG FONG J
30 JUNE 2022

Contract — Agreement — Absence of agreement — Malaysian architect sought to interest Singaporean businessmen to develop lands in Malaysia — Businessmen set up special-purpose company (D1) to explore commercial viability of project with no promise of commitment — Plaintiff provided D1 with all available information to help it decide — D1 decided not to proceed with project — Plaintiff billed D1 for rendition of professional construction consultancy services and filed suit when no payment was forthcoming — Whether D1 and the foreign businessmen-defendants were not liable — Whether plaintiff was not appointed to render any services but had provided D1 information on its own accord pro bono with hope of becoming project consultant if project had materialised — Whether plaintiff failed to prove fraud against the defendants

In the instant suit, the plaintiff sought to recover RM3,180,817.78 from the second to the fifth defendants in respect of professional construction consultancy services it had allegedly rendered to the first defendant ('D1') for architectural, civil and structural engineering, mechanical and electrical engineering and quantity surveying works plus disbursements in connection therewith. The fourth and fifth defendants ('D4' and 'D5') were Singaporeans who were shareholders and directors of the Singapore-incorporated third defendant ('D3') which wholly owned the second defendant ('D2'). D4 and D5 were also directors of D1 and D2. The plaintiff, through its architect-director PW1, had approached D2 and D3 through D4 and D5 to interest them in developing lands in Malaysia. After finding one proposed project interesting, the defendants set up D1 to look into the viability of the project and signed a memorandum of understanding ('MOU') with the relevant landowners. The plaintiff provided D1 with all relevant information to enable D1 to assess whether or not it was commercially viable for it to proceed with the project. D1 subsequently decided it was not viable and informed the plaintiff that it would not proceed with the project. The MOU was mutually terminated by the parties concerned. The plaintiff invoiced D1 for payment for various services it had rendered and when no payment was forthcoming, filed the instant action under which it sought a declaration that the second to the fifth defendants had knowingly carried on D1's business with intent to defraud the plaintiff or for a fraudulent purpose and that they should accordingly be held jointly and severally liable to pay the plaintiff its aforesaid claim of RM3,180,817.78. The defendants denied the claim stating that they

had never appointed the plaintiff to provide any consultancy services and counterclaimed against the plaintiff for damages.

Held, dismissing both the plaintiff's claim and the defendants' counterclaim:

(1) The preliminary communications between the parties were verbal only and were principally between PW1, on the one hand, and D4 and D5 on the other. The only documentary evidence was the MOU. As such, subject to contract, the relevant intended party that was to contract with the plaintiff was D1. The other defendants were distinct and separate legal personalities from D1 and were not liable to the plaintiff. D4 and D5 had merely acted in their capacities as directors of D1 vis a vis the plaintiff (see paras 30–32 & 35–37).

(2) The plaintiff had generally alleged fraud against D1 to justify lifting the corporate veil to make the defendants liable by relying on s 540(1) of the Companies Act 2016. However, the plaintiff failed to adduce any cogent evidence establishing fraud on the part of any of the defendants. The court found that the incorporation of D1 was not to defraud any of its creditors (see paras 38–40).

(3) It was the plaintiff, through PW1, who approached D2 and D3, as represented by D4 and D5, to solicit their interest to participate in development projects in Malaysia. This was unconventional, because it was more often the developer who already had the land and was desirous and ready to embark upon development who would approach the professional consultants. After having met the plaintiff, D2 and D3 were willing to consider embarking on developing the project only if it was commercially viable. From the beginning, they never committed to participate in the implementation of the project unless and until they were satisfied as to its commercial viability, but the plaintiff was eager and persistent; hence, they participated subject to contract. The setting up of D1 and the execution of the MOU was to obtain further information for assessment of the commercial viability of the project (see paras 47–49).

(4) The plaintiff as the introducer of the project busied itself pitching and 'hard-selling' the project to D2 and D3 to have it implemented soonest. There was an oral agreement between the parties that the plaintiff's involvement was on 'success basis' without charge unless and until D1 made the decision to implement the project. This was corroborated by the absence of any documentary evidence whatsoever on the appointment of the plaintiff to provide any kind of professional consultancy services. There was not even a letter of quotation from the plaintiff which would have otherwise been the norm. The plaintiff agreed to assist in D1's study into the feasibility of the project pro bono. In the circumstances, there was no agreement on the appointment of the plaintiff by conduct at all material times (see para 50).

(5) The several meetings and WhatsApp messages which took place in December 2013 and January to April 2014 between the plaintiff and D1 regarding the project focused on the plaintiff's provision of land title documents, market survey reports, coastal profile surveys and soil investigation reports of the land owners which were all geared towards the assessment of the commercial viability of the project. The communications and suggestions made by D1 were not instructions to the plaintiff in the capacity of an appointed professional construction consultant of D1. By the end of March 2014, D1 was satisfied that the project was not commercial viable and communicated as such to the plaintiff and the MOU was mutually terminated. Despite knowing that D1 did not intend to proceed with the project, the plaintiff continued to send to D1 drawings relating to the project on several occasions from April till December of 2014. This action of the plaintiff smacked of lack of bona fides (see paras 51–54).

(6) The plaintiff's claim for unpaid fees was not based on any agreement for payment of remuneration. There was no evidence that the plaintiff had rendered any of the services it claimed to have rendered to D1. At all material times, the plaintiff had only rendered some assistance on a pro bono basis to enable D1 to decide on the commercial viability of the project. D1 was therefore not contractually liable to the plaintiff on its claim (see paras 55–56 & 58).

(7) The plaintiff was not entitled to damages to be assessed on *quantum meruit* basis not only because of the oral agreement that was made between the parties but because it was not uncommon for the plaintiff's assistance to be regarded as the 'loss leader' in its aspiration to be appointed as the project consultant if the project had been implemented. This militated against any 'unjust enrichment' argument made out by the plaintiff (see para 59).

(8) The defendants' counterclaim was dismissed as it was unproven (see paras 62–63).

[Bahasa Malaysia summary

Dalam saman semasa, plaintif memohon mendapatkan semula RM3,180,817.78 daripada defendan kedua hingga kelima berhubung perkhidmatan perundingan pembinaan profesional yang didakwa telah diberikan kepada defendan pertama ('D1') untuk kejuruteraan seni bina, awam dan struktur, mekanikal dan kerja-kerja kejuruteraan elektrik dan ukur kuantiti ditambah dengan pembayaran yang berkaitan dengannya. Defendan keempat dan kelima ('D4' dan 'D5') adalah warga Singapura yang merupakan pemegang saham dan pengarah defendan ketiga yang diperbadankan di Singapura ('D3') yang memiliki sepenuhnya defendan kedua ('D2'). D4 dan D5 juga merupakan pengarah D1 dan D2. Plaintif, melalui pengarah

arkiteknya PW1, telah menghubungi D2 dan D3 melalui D4 dan D5 untuk menarik minat mereka dalam membangunkan tanah di Malaysia. Selepas mendapati satu projek yang dicadangkan menarik, defendan menubuhkan D1 untuk melihat daya maju projek tersebut dan menandatangani memorandum persefahaman ('MOU') dengan pemilik tanah yang berkaitan. Plaintif memberikan D1 dengan semua maklumat yang berkaitan untuk membolehkan D1 menilai sama ada ia berdaya maju secara komersial atau tidak untuk meneruskan projek. D1 kemudiannya memutuskan ia tidak berdaya maju dan memaklumkan plaintif bahawa ia tidak akan meneruskan projek tersebut. MOU tersebut telah ditamatkan secara bersama oleh pihak-pihak yang berkenaan. Plaintif menginvois D1 untuk pembayaran untuk pelbagai perkhidmatan yang telah diberikannya dan apabila tiada pembayaran diterima, memfailkan tindakan semasa di mana ia memohon satu deklarasi bahawa defendan kedua hingga kelima telah menjalankan perniagaan D1 dengan sengaja dengan niat untuk menipu plaintif atau untuk tujuan penipuan dan bahawa mereka sewajarnya dipertanggungjawabkan secara bersama dan berasingan untuk membayar plaintif tuntutannya sebanyak RM3,180,817.78. Defendan menafikan tuntutan dengan menyatakan bahawa mereka tidak pernah melantik plaintif untuk menyediakan sebarang perkhidmatan perundingan dan menuntut balas terhadap plaintif untuk ganti rugi.

Diputuskan, menolak kedua-dua tuntutan plaintif dan tuntutan balas defendan:

(1) Komunikasi awal antara pihak adalah secara lisan sahaja dan terutamanya antara PW1, di satu pihak, dan D4 dan D5 di pihak yang lain. Satu-satunya bukti dokumentari adalah MOU. Oleh yang demikian, tertakluk kepada kontrak, pihak berkenaan yang dimaksudkan untuk berkontrak dengan plaintif adalah D1. Defendan lain adalah personaliti undang-undang yang berbeza dan berasingan daripada D1 dan tidak bertanggungjawab kepada plaintif. D4 dan D5 hanya bertindak dalam kapasiti mereka sebagai pengarah D1 berbanding plaintif (lihat perenggan 30–32 & 35–37).

(2) Plaintif secara amnya telah mendakwa penipuan terhadap D1 untuk mewajarkan menyingkap tabir perbadanan syarikat untuk menjadikan defendan bertanggungjawab dengan bergantung kepada s 540(1) Akta Syarikat 2016. Walau bagaimanapun, plaintif gagal mengemukakan sebarang keterangan kukuh yang membuktikan penipuan terhadap sebahagian daripada mana-mana defendan. Mahkamah mendapati bahawa penggabungan D1 bukan untuk menipu mana-mana pemiutangnya (lihat perenggan 38–40).

(3) Ia adalah plaintif, melalui PW1, yang mendekati D2 dan D3, seperti yang direpresentasi oleh D4 dan D5, untuk memohon minat mereka

untuk menyertai projek pembangunan di Malaysia. Ini adalah tidak konvensional, kerana lebih kerap pemaju yang sudah memiliki tanah dan berhasrat serta bersedia untuk memulakan pembangunan yang akan menghubungi perunding profesional. Selepas bertemu dengan plaintif, D2 dan D3 bersedia untuk mempertimbangkan untuk memulakan pembangunan projek hanya jika ia berdaya maju secara komersial. Sejak awal, mereka tidak pernah komited untuk mengambil bahagian dalam pelaksanaan projek melainkan dan sehingga mereka berpuas hati dengan daya maju komersialnya, tetapi plaintif bersemangat dan gigih; oleh itu, mereka mengambil bahagian tertakluk kepada kontrak. Penubuhan D1 dan pelaksanaan MOU adalah untuk mendapatkan maklumat lanjut untuk penilaian daya maju komersial projek (lihat perenggan 47–49).

(4) Plaintif sebagai pengenal projek dengan giat memberikan cadangan dan 'hard-selling' projek tersebut kepada D2 dan D3 untuk melaksanakannya secepat mungkin. Terdapat perjanjian lisan antara pihak-pihak bahawa penglibatan plaintif adalah atas dasar kejayaan tanpa caj melainkan dan sehingga D1 membuat keputusan untuk melaksanakan projek tersebut. Ini disokong oleh ketiadaan sebarang bukti dokumentari mengenai pelantikan plaintif untuk menyediakan apa-apa jenis perkhidmatan perundingan profesional. Tidak ada pun surat sebut harga daripada plaintif yang sepatutnya menjadi kebiasaan. Plaintif bersetuju untuk membantu dalam kajian D1 tentang kebolehlaksanaan projek secara pro bono. Dalam keadaan tersebut, tiada persetujuan mengenai pelantikan plaintif melalui kelakuan pada setiap masa material (lihat perenggan 50).

(5) Beberapa perjumpaan dan mesej WhatsApp yang terjadi pada Disember 2013 dan Januari hingga April 2014 antara plaintif dan D1 berhubung projek tersebut tertumpu kepada penyediaan dokumen hak milik tanah oleh plaintif, laporan tinjauan pasaran, tinjauan profil pesisiran dan laporan siasatan tanah terhadap pemilik tanah yang kesemuanya menjurus kepada penilaian daya maju komersial projek tersebut. Komunikasi dan cadangan yang dibuat oleh D1 bukanlah arahan kepada plaintif dalam kapasiti perunding pembinaan profesional yang dilantik D1. Pada akhir Mac 2014, D1 berpuas hati bahawa projek itu tidak berdaya maju secara komersial dan dimaklumkan sedemikian kepada plaintif dan MOU telah ditamatkan secara bersama. Walaupun mengetahui bahawa D1 tidak berhasrat untuk meneruskan projek tersebut, plaintif terus menghantar lukisan D1 berkaitan projek itu beberapa kali dari April hingga Disember 2014. Tindakan plaintif ini menunjukkan kekurangan bona fides (lihat perenggan 51–54).

(6) Tuntutan plaintif untuk fi yang belum dibayar adalah tidak berdasarkan mana-mana perjanjian untuk pembayaran remunirasi. Tiada keterangan bahawa plaintif telah memberikan mana-mana perkhidmatan yang

didakwa telah diberikan kepada D1. Pada setiap masa material, plaintif hanya memberikan sedikit bantuan secara pro bono untuk membolehkan D1 membuat keputusan mengenai daya maju komersial projek tersebut. Oleh itu D1 tidak bertanggungjawab secara kontrak kepada plaintif atas tuntutannya (lihat perenggan 55–56 & 58).

(7) Plaintif tidak berhak mendapat ganti rugi untuk ditaksirkan berdasarkan *quantum meruit* bukan sahaja kerana perjanjian lisan yang dibuat antara pihak-pihak tetapi kerana ia bukan sesuatu yang luar biasa untuk bantuan plaintif dianggap sebagai 'loss leader' dalam aspirasinya untuk dilantik sebagai perunding projek sekiranya projek tersebut telah dilaksanakan. Ini bertentangan dengan sebarang hujah 'pengayaan tidak adil' yang dikemukakan oleh plaintif (lihat perenggan 59).

(8) Tuntutan balas defendan telah ditolak kerana ia tidak dapat dibuktikan (lihat perenggan 62–63).]

Cases referred to

Formis Resources Bhd & Ors v Risk Management and Safety System Pty Ltd & Ors and other appeals [2016] 6 MLJ 73, CA (refd)

Forum Petroleum Services & Anor v Ranhill International Inc & Anor [2015] MLJU 1925; [2015] 1 LNS 454, HC (distd)

Gumusut-Kakap Semi-Floating Production System (L) Ltd v Sabah Shell Petroleum Co Ltd [2017] MLJU 877, HC (refd)

Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153; [1995] 3 CLJ 9, CA (refd)

Hijau Bumi Petroleum Sdn Bhd v Platinum Green Chemicals Sdn Bhd & Ors [2017] MLJU 1259, HC (refd)

Iris Corporation Bhd v S & J Partners Sdn Bhd [2022] MLJU 518; [2022] 1 LNS 299, HC (refd)

JNA Ikhtisas Sdn Bhd v Kerajaan Malaysia [2015] 11 MLJ 257; [2015] 3 CLJ 1100, HC (refd)

Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd and another appeal [2013] MLJU 1646; [2013] 7 CLJ 713, CA (refd)

Orangebeam Construction Sdn Bhd v Usahasama Seri Cemerlang Sdn Bhd [2022] 1 LNS 307, HC (refd)

Ove Arup & Partners International Ltd and another v Mirant Asia-Pacific Construction (Hong Kong) Ltd and another [2005] EWCA Civ 1585, CA (refd)

Pamol (Sabah) Ltd & Anor v Joseph bin Paulus Lantip & Ors [2012] 5 MLJ 616, CA (refd)

RDS Bina Sdn Bhd v Ong Chin Hoe & Anor [2014] 11 MLJ 606, HC (refd)

Setapak Ria Condominium JMB v Low Koon Chuan & Ors [2019] 10 MLJ 273, HC (refd)

Spatial Ventures Sdn Bhd v Twintech Holdings Sdn Bhd [2014] 8 MLJ 38; [2013] 1 LNS 729, HC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tan Ah Chio & Ors v Lua Kim Soon & Ors [2015] 1 MLJ 334; [2014] 1 LNS 1004, CA (refd)
Tanjung Teras Sdn Bhd v Kerajaan Malaysia [2015] MLJU 2161; [2015] 9 CLJ 1002, CA (refd)
Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421; [2019] 2 CLJ 261, CA (refd)
Weststar Construction Sdn Bhd v Prisma Athira Architect [2017] MLJU 978; [2017] 9 CLJ 575, HC (refd)

Legislation referred to

Architects Act 1967 s 7B
Companies Act 2016 ss 540(1), 554, 554(1)
Contracts Act 1950 ss 71, 74
Architects Rules 1996 Third Schedule, para 7(2)

Dinesh Nandrajog (Nandrajog) for the plaintiff.
Joy Appukuttan (with Kelvynn Foo Wai Tzen) (KH Lim & Co) for the defendants.

Lim Chong Fong J:

INTRODUCTION

[1] This is a suit for recovery of professional construction consultancy services fees in respect of a hotel development project in Sepang, Selangor.

[2] The plaintiff is a Malaysian registered private limited company that is also registered as a multi-disciplinary practice with the Board of Architects Malaysia.

[3] The first defendant is a dormant Malaysian registered private limited company which has been struck off from the Companies Commission of Malaysia records and is thus dissolved.

[4] The second defendant is a Malaysian private limited company involved in the investment holding business and the wholly owned subsidiary of the third defendant.

[5] The third defendant is a Singapore registered private limited company involved in the lifestyle property development business. It is part of the Singapore registered public listed company Oxley Holdings Ltd ('OHL') that now has a diversified portfolio comprising of development and investment

projects in Singapore, Malaysia, United Kingdom, Ireland, Cyprus, Cambodia, Indonesia, China, Myanmar, Australia, Japan and Vietnam.

[6] The fourth and fifth defendants are Singaporean individuals who are both shareholder and director of the third defendant as well as director of the first and second defendants.

PRELIMINARY

[7] The plaintiff in this suit claims for the following professional construction consultancy services rendered to the second to fifth defendants as stated in its statement of claim:

(a) a declaration that the second defendant and/or third defendant and/or fourth defendant and/or fifth defendant had knowingly carried out the business of the first defendant with intent to defraud the plaintiff or for a fraudulent purpose and the second defendant and/or third defendant and/or fourth defendant and/or fifth defendant shall be jointly and severally liable to pay the plaintiff the following:

(i) the sum of RM1,577,593.04 to the plaintiff being the architectural fees for the said project;

(ii) the sum of RM484,355.51 to the plaintiff being the civil and structural engineering fees for the said project;

(iii) the sum of RM484,355.51 to the plaintiff being the mechanical and electrical engineering fees for the said project;

(iv) the sum of RM620,463.72 being the quantity surveying fees for the project; and

(v) the sum of RM14,050 being the disbursement for the project.

(b) further and/or in the alternative, damages to be assessed for *quantum meruit*;

(c) costs;

(d) interest at the rate of 1.5%pa on the judgment sum from 29 December 2014, the date of the receipt of the invoices with reference number YTS/OXLEY-SEPANG/ARC/01, YTS/OXLEY-SEPANG/C&S/01, YTS/OXLEY-SEPANG/M&E/01, YTS/OXLEY-SEPANG/Q&S/01 and YTS/OXLEY-SEPANG/MISC/01 until the date of full and final settlement; and/or

(e) interest at the rate of 1.5%pa on the judgment sum from the date of the judgment until the date of full and final settlement; and

(f) such further and/or other reliefs deemed fit and appropriate by this honourable court. A

[8] The second to fifth defendants (collectively 'defendants') in turn counterclaimed for the following for breaches and misrepresentations by the plaintiff as stated in their statement of defence and counterclaim: B

(a) damages;

(b) aggravated and/or exemplary damages;

(c) interest at the rate of 5%pa on all sums awarded by this honourable court calculated from 28 December 2020 until fill resolution; C

(d) costs together with interest thereon at the rate of 5%pa on all sums awarded by this honourable court calculated from 28 December 2020 until fill resolution; and D

(e) such further and other orders and/or other reliefs as this honourable court deems fit and proper.

[9] The trial of this suit took two days on 8 and 9 February 2022. E

[10] The trial documents were marked as Bundles A to M with the documentary evidence collated in Bundles B to K that by consent carried Status A or B as designated therein. In the course of the trial, exhs D1 to D3 were also admitted in evidence. F

[11] The plaintiff called its director Yeap Teak Sing ('PW1') as its sole witness whereas the defendants called its directors Low See Ching (DW1 and the fifth defendant himself) and Ching Chiat Kwong (DW2 and the fourth defendant himself) as witnesses who all gave sworn testamentary evidence. G

[12] After the close of the trial, the parties simultaneously furnished their respective written closing submissions in chief and written closing submissions in reply as directed by me. Oral submissions and clarification with counsel was held on 11 May 2022. I thereafter adjourned my decision to deliberate on the respective contentions advanced by the parties. H

[13] Now after having analysed all the evidence adduced and submissions presented, I furnish my decision below together with the supporting grounds. I

A BACKGROUND FACTS

[14] In early 2013, PW1 met DW2. PW1 introduced himself as an architect and represented that he knows a couple of Malaysian landowners including Sepang Goldcoast Sdn Bhd ('SGSB').

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[15] PW1 also made proposals on 20–30 possible development projects in Malaysia that might interest the defendants including the Sepang Hotel Development project ('project') situated at Lot 5722, Sepang Goldcoast, Mukim Dengkil, Daerah Sepang, Selangor Darul Ehsan owned by SGSB.

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[16] For purposes of participating in the project, the first defendant has been specifically incorporated on 8 July 2013.

D **[17]** The plaintiff as represented by PW1 on 6 December 2013 furnished the first defendant as represented by DW1 and/or DW2 with drawings dated 23 February 2012 prepared for Coastal Paradise Development. In addition, the plaintiff as represented by PW1 also furnished the first defendant as represented by DW1 and/or DW2 with existing information including

E drawings, reports and massings of the project obtained from SGSB.

[18] This was followed by the execution of a memorandum of understanding dated 20 January 2014 between the first defendant, SGSB and Sepang Bay Sdn Bhd ('SBSB'). The MOU is reproduced below:

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65

- 1 -

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING is made on this 20 JAN 2014 day of 2014.

BETWEEN

SEPANG GOLDCOAST SDN BHD (Co No: 483004-P), a company incorporated in Malaysia and having its place of business at 4th Floor, Wisma CNI, No. 2 Jalan U1/17, Hicom Glenmarie Industrial Park, 40000 Shah Alam, Selangor (**"Sepang Goldcoast"**) of the one part;

AND,

SEPANG BAY SDN BHD (Co No: 608466-D), a company incorporated in Malaysia and having its place of business at 4th Floor, Wisma CNI, No. 2 Jalan U1/17, Hicom Glenmarie Industrial Park, 40000 Shah Alam, Selangor (**"Sepang Bay"**) of the second part;

AND

OXLEY TREASURE SDN BHD (Co No: 1053294-X), a company incorporated in Malaysia and having its registered office at Upper Penthouse, Wisma RKT, No. 2, Jalan Raja Abdullah off Jalan Sultan Ismail 50300 Kuala Lumpur (**"Oxley"**) of the other part.

RECITALS

(A) **RELATIONSHIP OF SEPANG GOLDCOAST & SEPANG BAY**

(i) Sepang Bay and Permodalan Negeri Selangor Berhad ('PNSB') (Company No. 206347-W) a company duly incorporated in Malaysia and has its place of business at 25th Floor, Wisma MBSA, Persiaran Perbandaran, 4000 Shah Alam, Selangor have entered into a Joint Venture Agreement dated 30 June 2003 (**'PNSB JVA'**), to develop the lands therein stated upon the terms and conditions therein contained and wherein Sepang Bay represents as follows:

(a) That the leasehold land held under title particulars HSD 18372 No. Lot PT 5249 Mukim Sepang Daerah Sepang, Negeri Selangor (**'Lot 5249'**) forms part of land comprised in the PNSB JVA.

A copy of the issue document of title to Lot 5249 is attached as **Annexure 1** to this Memorandum of Understanding (**'MOU'**).

(b) PNSB has agreed to transfer inter alia Lot 5249 to a joint venture company incorporated pursuant to the PNSB JVA as and when required.

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(ii) Pursuant to the PNSB JVA, Sepang Goldcoast was incorporated as the joint venture company wherein Sepang Bay and PNSB are its shareholders.

(iii) Sepang Goldcoast is a subsidiary of Sepang Bay.

(iv) PNSB is substantially owned by the Selangor State Government through Perbadanan Menteri Besar Selangor.

(B) **SEPANG GOLDCOAST OWNERSHIP & CONDITION OF LANDS**

Sepang Goldcoast makes the following representations to Oxley:

(i) Sepang Goldcoast is the legal, registered and beneficial owner of all that parcel of leasehold lands held under H.S.(D) 33146 No. PT. 9580 (measuring approximately 6.222 hectars) (**'Lot 9580'**) situated in Mukim Sepang, Daerah Sepang, Negeri Selangor.

A copy of the individual document of title to Lot 9580 is attached hereto as **ANNEXURE 2.**

(ii) Lot 9580 has the following conditions and restrictions,

(a) The category of land use is 'Building'.

(b) The tenure on the land is for 99 years expiring on 3 November 2093.

(c) Syarat Nyata – Pembinaan bangunan-bangunan mengikut JPBD Negeri Selangor. (Express Condition - The construction of all buildings must be in accordance with Selangor State's JPBD)

(d) Sekatan Kepentingan – Tanah ini tidak boleh dijual, digadai atau dipindahmilik dengan apa cara sekalipun melainkan dengan kebenaran Pihak Berkuasa Negeri. (Restriction-in-Interest -The Land cannot be sold, charged or transferred in any manner whatsoever save with the consent of the State Authority).

(iii) Sepang Goldcoast is in the process of transferring Lot 9580 to CAREY ISLAND WATERFRONT SDN BHD (Co No: 786821-M), a related company duly incorporated in Malaysia and having its place of business at 4th Floor, Wisma CNI, No. 2 Jalan U1/17, Hicom Glenmarie Industrial Park, 40000 Shah Alam, Selangor (**"Carey Island"**)

(iv) Save and except for the pending transfer to Carey Island, Lot 9580 is free from any and all charges, caveats, liens, interests equitable or otherwise, mortgage, assignment and all other encumbrances registered or otherwise.

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67

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(v) Sepang Goldcoast and Sepang Bay represents that there are no third party interest in and to Lot 9580 directly or indirectly, legal, equitable or otherwise save and except the

(vi) As at the date of this MOU, Sepang Goldcoast and Sepang Bay are not aware of any acquisition proceedings or intended acquisition proceedings of whatever kind over Lot 9580.

(vii) As at the date of this MOU, Sepang Goldcoast and Sepang Bay are not aware of any impediments that exist which would obstruct any development that maybe undertaken by Oxley on Lot 9580.

(C) SEPANG BAY'S REPRESENTATIONS

(i) Sepang Bay and PNSB under PNSB JVA have agreed to inter alia carry out the development of Lot 5249 through Sepang Goldcoast.

(ii) Lot 5249 consist of a land area of approximate 41.124 hectares comprising of both shore land and sea land.

(iii) Lot 5249 has the following conditions and restrictions,

(a) The category of land use is 'Agriculture'.

(b) The tenure on the land is for 99 years expiring on 12 September 2104.

(c) Syarat Nyata – 'Tanaman Kekal Am' (Express Condition - permanent crops).

(d) Sekatan Kepentingan – 'Tanah ini tidak boleh dipindah milik, dipajak atau digadai melainkan dengan kebenaran Pihak Berkuasa Negeri.' (Restriction The Land cannot be transferred, leased or charged save with the consent of the State Authority).

(iv) Lot 5249 is free from any and all charges, caveats, liens, interests equitable or otherwise, mortgage, assignment and all other encumbrances registered or otherwise.

(v) Save for PNSB, Sepang Goldcoast and Sepang Bay represents that there are no third party interest in and to Lot 5249 directly or indirectly, legal, equitable or otherwise.

(vi) As at the date of this MOU, Sepang Goldcoast and Sepang Bay are not aware of any acquisition proceedings or intended acquisition proceedings of whatever kind over Lot 5249.

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68

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– 4 –

(vii) As at the date of this MOU, Sepang Goldcoast and Sepang Bay are not aware of any impediments that exist which would obstruct any development that maybe undertaken by Oxley on Lot 5249.

(D) **DEVELOPMENT**

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(i) Sepang Goldcoast (and through Carey Island) and Sepang Bay are desirous to engage with Oxley to develop Lot 5249 and Lot 9580.

Unless otherwise provided, Lot 9580 and Lot 5249 are hereinafter collectively referred to as the **'Lands'**.

(ii) Oxley is prepared to enter into individual joint venture agreements (**'JVAs'**) with Sepang Goldcoast (or Carey Island) with respect to Lot 9580 and Sepang Bay (and/or Sepang Goldcoast and/or Carey Island and/or PNSB) with respect to Lot 5249, respectively, to develop these Lands through phased development, construction and building inter alia of commercial and/or residential accommodation on these Lands (**"Project"**) on the terms and subject to the conditions to be mutually agreed upon in the respective JVAs.

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(iii) Sepang Goldcoast and Sepang Bay have acknowledged that Oxley has entered into this MOU premised on the representations made herein in this recitals and in reliance upon these representations.

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NOW THIS UNDERSTANDING IS SET FORTH as follows:

1. **JVAs**

Sepang Goldcoast and Sepang Bay on the one part and Oxley on the other part have agreed to enter into this MOU to enable Oxley to develop the Lands, carry out and complete the Project on the terms and conditions as the parties shall mutually agree in the respective JVAs to be executed either by themselves or with Carey Island after the transfer of the respective Lands to Carey Island.

F

2. **SEPANG GOLDCOAST AND SEPANG BAY COVENANTS**

2.1. Upon the execution of this MOU, Sepang Goldcoast and Sepang Bay shall as soon as possible but prior to the execution of the respective JVAs, shall provide Oxley with PNSB's written confirmation to allow Sepang Goldcoast to enter into JVAs and such other agreement(s) with Oxley and/or its nominees to develop the Project on Lot 5249.

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22

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69

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- 5 -

2.2. Oxley shall be entitled to carry out a complete search on the Lands with the relevant authorities, to enter, examine and inspect the Lands, and to carry out all necessary surveys and tests (including soil tests) on the Land to confirm that Oxley can carry out the Project on the Lands at the cost and expense of Oxley. In this respect, Sepang Goldcoast and Sepang Bay agree to render all assistance as shall be requested by Oxley.

C

3. **TERMS AND CONDITIONS OF THE JVA**

3.1. Upon the execution of this MOU parties shall attend to and negotiate and mutually agree on the terms and conditions of the JVAs.

3.2. These joint venture agreement shall contain the following salient terms;

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3.2.1. Sepang Goldcoast (inclusive of Sepang Bay & Carey Island) shall be entitled to fifteen percent (15%) of the Gross Development Value ("**GDV**") from the development of Lot 9580 and Sepang Bay (inclusive of Sepang Goldcoast, Carey Island & PNSB) shall be entitled to fifteen percent (15%) of the GDV from the development of Lot 5249; and

3.2.2. Oxley shall be entitled to eighty five percent (85%) of the GDV from the development of both Lands, respectively.

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4. **DEVELOPMENT OF BOTH LANDS**

For the avoidance of doubt, parties mutually agree that the development is over both Lands by Oxley and in the event parties are unable to agree on the terms and conditions of any one of the JVAs with respect to any one of the piece of Lands, then either party may withdraw from the entire transaction and negotiations, whereupon neither party shall have any claims one against the other.

F

5. **NO DEALINGS WITH THE LANDS**

Sepang Goldcoast and Sepang Bay agrees that they shall not howsoever deal or encumber the Land or any part thereof in any manner or way, or do any act, deed or thing that permits any of the aforementioned to be done save for the transfer of Lot 9580 to Carey Island.

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6. **CONFIDENTIALITY**

That save for disclosure to the parties respective solicitors, consultants and/or the relevant authorities (in the case of Oxley, shall include public announcements) or where required by laws of Malaysia and/or Singapore:

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23

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– 6 –

6.1. Each party shall keep confidential and shall not divulge to any other party or person, *(a)* the contents of this MOU, or *(b)* any agreement or document referred to in this MOU, or *(c)* any proprietary or confidential information belonging to the other party.

6.2. Save where Oxley agree in writing, Sepang Goldcoast and Sepang Bay shall not divulge to any other person any part of this MOU, the Project nor howsoever publish or make public the development of the Lands by Oxley.

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7. SEPANG GOLDCOAST AND SEPANG BAY REPRESENTATION & RECITALS

Sepang Goldcoast and Sepang Bay agree that the recitals to this MOU are true and accurate and shall be read taken and construed as an essential part of this MOU.

8. MUTUAL ASSISTANCE

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The parties shall do all acts, deeds and things reasonably required by the other party or the relevant authorities, for the early, prompt and timely procurement and/or issuance of the development order, approval for all plans and drawings with respect to the Project and/or any matter howsoever related to the Project and the development of the Lands including the providing of any confirmation, documents, information and/or ratification required by the relevant authorities.

E

9. FORCE MAJEURE

Neither party shall be considered in default of the performance of their respective obligations under this MOU if the performance is prevented, delayed or restricted by any Act of God, war, civil commotion, riots, strikes, lock outs, labour disputes or unrest, intervention or restrictions imposed by the relevant authorities, earthquakes, tsunami, floods, storms or such acts & force of nature beyond the control of the party or military acts provided always that the party

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invoking such an event shall have given notice to the other and shall take all reasonable actions necessary to remove the cause(s) of such prevention, delay or restriction and to proceed with the performance of the obligation as soon as practicable.

10. NO PARTNERSHIP

This MOU is not intended and does not howsoever create any agency or partnership between Sepang Goldcoast and Sepang Bay on the one part and Oxley on the other.

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11. COSTS

Each party shall bear their own solicitors' costs provided that all stamp duty payable on this MOU shall be borne by Oxley.

SKYEOH & PARTNERS

12. NOTICE

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71

- 7 -

Save where expressly provided otherwise, all notices, requests or other communications shall be in writing and in the English language and shall be served on the other party at the address set out in this MOU in any of the following manner:

12.1. By hand despatched, whereupon service shall be deemed upon the recipient's acknowledgement of receipt thereof.

12.2. By registered post, whereupon service shall be deemed upon the expiry of 5 days from posting, regardless of actual service.

12.3. By facsimile, whereupon service shall be deemed upon the recipient's facsimile number being shown on the sender's receipt of a confirmed print-out for the transmission regarding the date, time and transmission of all pages of the facsimile.

12.4. By e-mail whereupon service shall be deemed upon the recipient's facsimile e-mail address being shown on the sender's receipt of a confirmed print-out for the transmission regarding the date, time and transmission of the e-mail and all attachments thereto.

Provided that any change in the address of any party shall be in writing and served on the other parties by hand despatch.

13. **LAW APPLICABLE**

This MOU shall be governed and be construed in accordance with the laws of Malaysia. The parties agree to submit to the jurisdictions of the Courts in Malaysia. Where so required by Oxley, Sepang Goldcoast, Carey Island and/or Sepang Bay shall assist and comply with the laws of Singapore.

14. **SUCCESSORS IN TITLE**

This MOU shall be binding upon the permitted assigns and successors-in-title of the parties hereto.

In the circumstances, the expression "Sepang Goldcoast", "Carey Island", "Sepang Bay" and "Oxley" shall mean and include their respective permitted assigns and successors in title.

End

SKYEOH & PARTNERS

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- 8 -

IN WITNESS WHEREOF the parties have hereunto set their hands the day and year first above written.

C

SIGNED by)
For and on behalf of Sepang Goldcoast)
In the presence of :-)

Name: ANG CHEE KIAN
NRIC No: 620802-10-5603
Designation: DIRECTOR

YAP TEAK SING
NRIC NO: 660511-10-7007

D

SIGNED by)
For and on behalf of Sepang Bay)
In the presence of :-)

E

Name: GAN CHOOI YANG
NRIC No: 601113-10-5479
Designation: DIRECTOR

YAP TEAK SING
NRIC NO: 660511-10-7007

F

SIGNED by)
For and on behalf of the Oxley)
In the presence of:)

G

Name: CHING CHIAT KWONG
Designation: DIRECTOR
NRIC No: P/P No: E2419803L

YAP TEAK SING
NRIC NO: 660511-10-7007

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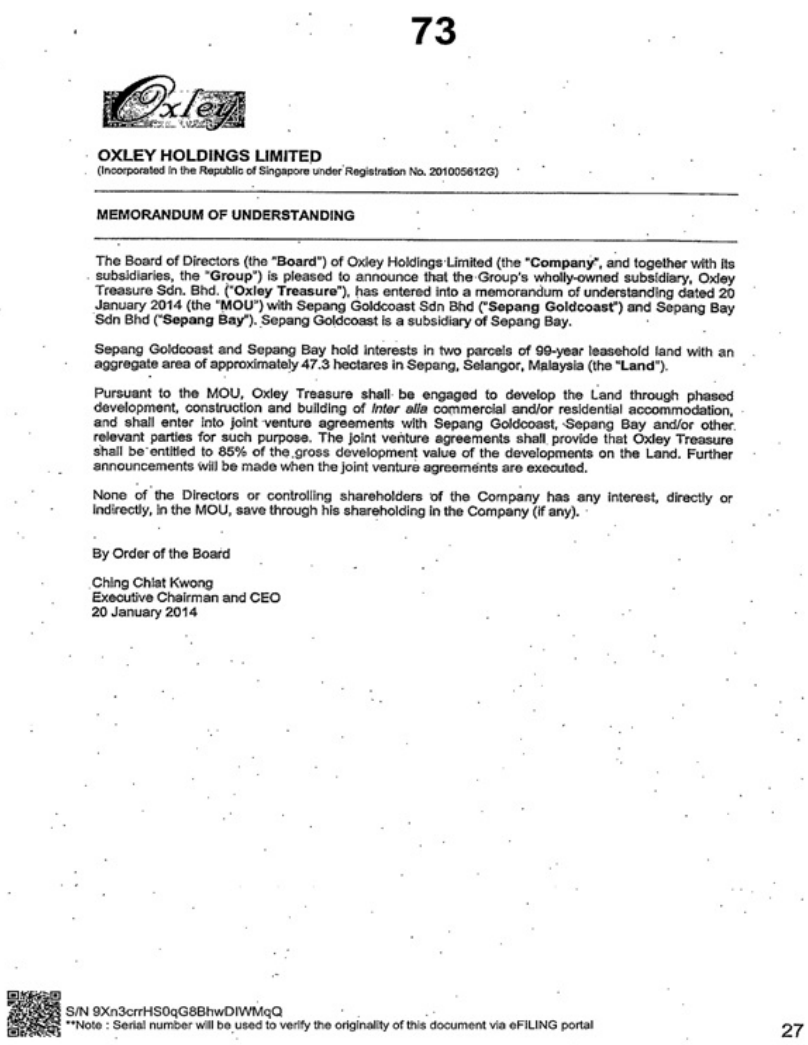
[19] As the result, the first defendant's principal OHL on 20 January 2014 also made the following corporate public announcement:



73

Oxley

OXLEY HOLDINGS LIMITED
(Incorporated in the Republic of Singapore under Registration No. 201005612G)

MEMORANDUM OF UNDERSTANDING

The Board of Directors (the "**Board**") of Oxley Holdings Limited (the "**Company**", and together with its subsidiaries, the "**Group**") is pleased to announce that the Group's wholly-owned subsidiary, Oxley Treasure Sdn. Bhd. ("**Oxley Treasure**"), has entered into a memorandum of understanding dated 20 January 2014 (the "**MOU**") with Sepang Goldcoast Sdn Bhd ("**Sepang Goldcoast**") and Sepang Bay Sdn Bhd ("**Sepang Bay**"). Sepang Goldcoast is a subsidiary of Sepang Bay.

Sepang Goldcoast and Sepang Bay hold interests in two parcels of 99-year leasehold land with an aggregate area of approximately 47.3 hectares in Sepang, Selangor, Malaysia (the "**Land**").

Pursuant to the MOU, Oxley Treasure shall be engaged to develop the Land through phased development, construction and building of *inter alia* commercial and/or residential accommodation, and shall enter into joint venture agreements with Sepang Goldcoast, Sepang Bay and/or other relevant parties for such purpose. The joint venture agreements shall provide that Oxley Treasure shall be entitled to 85% of the gross development value of the developments on the Land. Further announcements will be made when the joint venture agreements are executed.

None of the Directors or controlling shareholders of the Company has any interest, directly or indirectly, in the MOU, save through his shareholding in the Company (if any).

By Order of the Board

Ching Chiat Kwong
Executive Chairman and CEO
20 January 2014

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27

[20] Subsequently, the first defendant as represented by DW1 and/or DW2 met the plaintiff as represented by PW1 in Malaysia including visiting the project site and further exchanged emails on 30 January 2014 and 7 February 2014 as well as WhatsApp messages on 25 March 2014.

[21] The first defendant subsequently on 21 and 29 April 2014 as well as on 15 May 2014 informed the plaintiff as represented by PW1 that the first defendant did not require any further information in relation to the project.

[22] The MOU was thereafter mutually terminated by exchange of letters between the first defendant and SGSB and SBSB jointly on 12 and 24 June 2014.

[23] On 29 December 2014, the plaintiff issued its invoices to the first defendant for professional services rendered for the project with reminders made from 2015 to 2020.

[24] The first defendant was struck out from the Companies Commission of Malaysia records on 5 February 2018.

[25] By reason of non-receipt of payment as invoiced, the plaintiff instituted this suit on 28 December 2020.

ISSUES FOR DETERMINATION

[26] I distil the following broad issues that require determination by me from the pleadings, issues to be tried and closing submissions of the parties:

(a) relevant contracting parties;

(b) professional consultancy services rendered; and

(c) consequential reliefs of the parties.

[27] They will be dealt *seriatim*.

RELEVANT CONTRACTING PARTIES

[28] The plaintiff in this suit made its claim against five parties premised upon the following circumstances:

(a) at all material times, the fourth defendant and fifth defendant are shareholders and directors of the first to third defendants;

(b) the first defendant is a subsidiary of the second defendant of which in turn is a subsidiary of the third defendant;

(c) the second to fifth defendants have the control over the ownership and management of the first defendant as the fourth defendant and fifth defendant had in their position as directors and shareholders of the second defendant and third defendant established the first defendant and made themselves as directors of the first defendant to proceed with the project. Hence, the fourth and fifth defendants are in control and managed the first to third defendants;

(d) the fourth and fifth defendants had actively participated in the project via various instructions, correspondences and meetings held with the plaintiff;

(e) the first defendant was established purely for the purpose of the project with a paid-up capital of RM2;

(f) the first defendant was dissolved four years after the termination of the MOU with the SGSB and SBSB and after receiving the plaintiff's invoices;

(g) the first to fifth defendants at all material times knew that the plaintiff had started provision of its services and were aware of the terms of the contract; and

(h) the plaintiff has been sending reminders for payment to all the first to fifth defendants but they have been ignoring the same and did not even send a reply to the plaintiff to deny such outstanding payment.

[29] The defendants in opposition deny the plaintiff's contentions. According to them, the relevant party that dealt with the plaintiff at all material times is the first defendant but there was no contract whatsoever that was entered between them. The second to fifth defendants are distinct and separate entities from the first defendant and are thus not liable whatsoever in respect of the plaintiff's claim made against them in this suit.

[30] From the evidence adduced before me, I find that the preliminary communications between the parties are verbal only principally between PW1 and DW1 and/or DW2. The documentary evidence relating to the project is seen for the first time in the MOU made concurrent with the corporate public announcement by OHL.

[31] In the premises and out of sheer commercial reality, I further find that, subject to contract, the relevant intended party that will contract with the plaintiff is the first defendant.

[32] As contended by the defendants, I also find and hold that the second to fifth defendants are distinct and separate legal personalities from the first defendant. In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751

(FC) Gopal Sri Ram FCJ held as follows:

> ... once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

[33] Nonetheless, the plaintiff made the attempt to lift or pierce the corporate veil *simpliciter*. In *Setapak Ria Condominium JMB v Low Koon Chuan & Ors* [2019] 10 MLJ 273, Darryl Goon Siew Chye J (later JCA) held as follows:

> ... the concept of piercing the corporate veil not employed for the purpose of imposing the liability of a corporate entity on the individuals behind it ... if they were not under any legal liability or obligation in the first place. To allow for this would have far reaching consequences. It could lead to directors or shareholders being personally liable ... as the conduct of companies are necessarily based on the decisions or directions of individuals who manage and control it.

[34] Firstly in respect of the fourth defendant and fifth defendant who have dealt with the plaintiff, it is axiomatic that the first defendant as well as the second and third defendants being body corporates can only act through directors and officers. In *Hijau Bumi Petroleum Sdn Bhd v Platinum Green Chemicals Sdn Bhd & Ors* [2017] MLJU 1259, Mohd Nazlan Mohd Ghazali J (now JCA) held as follows:

> [26] Moreover, in *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 2 All ER 625 Walton J described the nature of a company in the following terms:
>
> > ... the company as such was only a juristic figment of the imagination, lacking both a body to be kicked and a soul to be damned. From this it followed that there must be some one or more human persons who did, as a matter of fact, act on behalf of the company, and whose acts therefore must, for all practical purposes, be the acts of the company itself.
>
> [27] It is quite clear that what this means is that because of the nature of a company which is a legal fiction, it requires natural persons in the form of usually directors (such as stipulated under s 122(1) of the Companies Act 1965 for a company to have a minimum of two directors) or other agents, to be the directing mind and will of the company. The second and third defendants are amongst the directors of the first defendant. Thus, any communications, negotiations, agreements and other conduct performed and arrived at by the second and third defendants in respect of the said contract must therefore be imputed and attributed to be the act of the first defendant, since the latter, being a company and an artificial person, can only act through its directors, officers or agents.

See also *Formis Resources Bhd & Ors v Risk Management and Safety System Pty*

Ltd & Ors and other appeals [2016] 6 MLJ 73 that extended this principle to a group of companies.

[35] Consequently, I find and hold that both the fourth defendant and fifth defendant acted in the capacity of director on behalf of the first defendant vis a vis the plaintiff at all times and are hence per se not liable to the plaintiff.

[36] Next as to the second defendant which is the holding company of the first defendant and the third defendant which is the holding company of the second defendant, I find that the principle of distinct and separate legal personalities applies likewise. In *Pamol (Sabah) Ltd & Anor v Joseph bin Paulus Lantip & Ors* [2012] 5 MLJ 616 (CA), Abdul Malik Ishak JCA held as follows:

> [15] The plaintiffs' claims for alleged misrepresentation, conspiracy and fraud lie only against the first and second defendants. All the four defendants were at all material times separate legal entities possessed of separate rights and liabilities and traded in that way. All the plaintiffs have failed to particularise that plea in order to show that all the four defendants were operating as a group enterprise constituting one single commercial unit as distinct from being separate legal entities. It is trite that companies are separate legal entities even if they form part of a group of companies. And the liabilities of one company cannot be visited on another.
>
> [16] At this juncture, it is ideal to set out the law. In company law, a company has personality that is distinct from that of its shareholders. This simple legal proposition emanates from the decision of the House of Lords in *Aron Salomon (Pauper) v A Salomon And Company, Limited, A Salomon And Company, Limited v Aron Salomon* [1897] AC 22 (HL) ...

The case of *Forum Petroleum Services & Anor v Ranhill International Inc & Anor* [2015] MLJU 1925; [2015] 1 LNS 454 relied by the plaintiff is distinguishable on their facts. It must also be noted that the first defendant was specifically incorporated for the purpose of this project.

[37] As such, I also find and hold that the second and third defendant are not liable to the plaintiff whatsoever.

[38] It is pertinent to note that the plaintiff has also generally alleged fraud committed by the first defendant to justify lifting or piercing the corporate veil making the defendants liable to the plaintiff by relying on s 540(1) of the Companies Act 2016 and the cases of *RDS Bina Sdn Bhd v Ong Chin Hoe & Anor* [2014] 11 MLJ 606 and *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 2 CLJ 261.

[39] This has been strenuously denied by the defendants including on the plaintiff's allegation having set up the first defendant with only the paid-up capital of RM2. This was explained by DW2 as follows at the trial which I find

normal and commercially acceptable:

> Q: Ok. Now are you aware that the, I mean you are the director of the, you were the director of Oxley Treasure so I am pretty sure you are aware that the first defendant (Oxley Treasure Sdn Bhd) has only a paid-up capital of RM2.00. So my question, Mr Ching, why was it this company that was intending to develop quite a large development, why was it only, it only contained paid-up capital of only RM2.00?
>
> A: From my understanding, the paid-up capital can be increased if the project is viable and we have decided to invest into it.
>
> Q: Ok. So I put it to you, Mr Ching, now when I put a question, you either agree or disagree. I put it to you, Mr Ching, that the reason why Oxley Treasure Sdn Bhd was established and with a paid-up capital of RM2.00 only was because Oxley Treasure had no intention of paying the company's prospective creditors at that material time. Do you agree or disagree?
>
> A: Disagree.

Simply put, I find that the incorporation of the first defendant is not to defraud any of its creditors.

[40] Aside from the RM2 paid-up capital of the first defendant, I further find that the plaintiff failed to adduce any cogent evidence establishing fraud on the part of the first defendant or any of the other defendants as well. It is clear from the case of *Gumusut-Kakap Semi-Floating Production System (L) Ltd v Sabah Shell Petroleum Co Ltd* [2017] MLJU 877 that mere contractual disputes are not fraudulent conducts.

[41] That notwithstanding, even if there was any fraud as so alleged, I also find that the plaintiff was indolent in excess of six years by having failed to sue within reasonable time from the contemporaneous moments in 2013–2014 without reasonable explanation. As suggested by the defendants, the plaintiff's action is 'a clear case of allegations cooked up as afterthoughts'. In particular, the suit has been instituted against the defendants to embarrass and pressure them into a settlement.

PROFESSIONAL CONSULTANCY SERVICES RENDERED

[42] The plaintiff contended that its has rendered and billed for professional consultancy services rendered amounting to RM3,180,817.79 comprising of architectural, civil and structural engineering, M & E engineering and quantity surveying fees as well as disbursements for the project as particularised in its statement of claim and summarised in para [7](a) above.

[43] In this respect, the plaintiff strenuously relied on the case of *JNA Ikhtisas Sdn Bhd v Kerajaan Malaysia* [2015] 11 MLJ 257; [2015] 3 CLJ 1100 where

Mary Lim J (now FCJ) held as follows as summarised in the headnotes:

(1) Since there was proof that the plaintiff rendered services requested by the defendant, the defendant must therefore pay for those services. The plaintiff prepared at least 443 drawings. Many of those drawings were amended and re-submitted by the plaintiff following the defendant's comments and instructions. The fact that there was no formal contract was irrelevant. There was no evidence that the parties intended that there would be no contract until and unless a formal agreement was drawn up and signed between the parties and a letter of award issued. Under the original arrangements, the defendant clearly intended the plaintiff to render services under a direct negotiated contract, which meant the plaintiff would be paid directly by the defendant; and not by the contractor which was awarded the design and build contract. (paras 33, 35 & 37)

(2) There was no evidence nor was it the plaintiff's contention that the plaintiff provided the professional services for free. The evidence was that the plaintiff expected to be paid for it. The court found that the relevant cut-off date was when the plaintiff knew that the defendant had changed its decision to award phase 2 through a design and build contract. In the absence of any other evidence, that date was at the end of March. (paras 39–41)

(3) So long as the plaintiff had assisted in the relevant work, it should be paid. The question was the degree of involvement; whether it had done all that was required under the scale fees. The plaintiff was prepared to say that it was not entitled to the full sum as its work had not reached the tender stage. There was in fact evidence of the plaintiff being asked to amend its work and the amendments sought by the defendant and acted upon by the plaintiff amounted to work towards obtaining the requisite approval. Under such conditions, the defendant could not turn around and suggest that the work by the plaintiff was not payable. The non-approval of the plaintiff's work was not due to any fault on the part of the plaintiff at all but was because the defendant did not set about considering it in the first place. There was no evidence that the plaintiff's work was well below the requirements or that the work would not have been approved at the relevant time. Therefore, the plaintiff's work must be assumed to be according to the defendant's requirements and the plaintiff must be paid accordingly. The court was satisfied that the plaintiff was at the design stage and that both levels at that stage had been met. Therefore, the plaintiff was entitled to be paid 75% of its total fees ie, RM2,089,017 (paras 45, 52, 57–59).

[44] The plaintiff also relied on the cases of *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153; [1995] 3 CLJ 9 and *Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd and another appeal* [2013] MLJU 1646; [2013] 7 CLJ

713 (CA) where claims are enforced notwithstanding that was no agreement made in writing.

[45] The defendants in opposition counter-contended that there is no agreement to appoint the plaintiff to provide the aforementioned professional consultancy services at all material times. There was a memorandum of agreement of engagement of professional architect for architectural consultancy services dated 29 May 2014 singularly produced and unilaterally signed by the plaintiff together with a series of letters of confirmation of appointment of architectural, civil and structural engineering, M & E Engineering and quantity surveying services of the same date also singularly produced and unilaterally signed by the plaintiff. They were all unsigned by the first defendant. In fact it was only the memorandum of agreement that was delivered by post to the first defendant on or about 29 December 2014 but there is no evidence of service of the letters of confirmation of appointment upon the first defendant because they were addressed to the plaintiff's own office address!

[46] The critical question of whether there is a concluded and binding contract of appointment to provide of architectural, civil and structural engineering, M & E engineering and quantity surveying services is in my view a question of fact dependent upon the peculiar circumstances of each case.

[47] From the evidence adduced, I firstly find that it was the plaintiff through PW1 who approached the second/third defendants as represented by DW1 and/or DW2 to solicit their interest in participating in development projects in Malaysia that included projects in Kuala Lumpur, Penang and this project. This is not conventional because it is more often the developer who already has the land as well as is desirous and ready to embark upon development who approaches the professional consultants as seen in the recent case of *Orangebeam Construction Sdn Bhd v Usahasama Seri Cemerlang Sdn Bhd* [2022] 1 LNS 307 that come before me.

[48] Secondly, I find that the second/third defendants after having met the plaintiff was willing to consider embarking on developing the project only if it is commercially viable. This is plainly borne out from the following testimony of DW2 which I accept:

> We are in the business of development in many countries and we deal with many consultants worldwide. If there is a fee to be paid, there will be negotiation and finalization through a formal agreement. Here, it is very clear that it was the plaintiff who proposed the Sepang project to us and it was not in a context of consultant architect.

Hence, it was for the plaintiff to inform us of the viability of the Sepang project and to provide us with the proposed plan, drawings, feasibility study (if any) and other materials for us to consider the viability of the Sepang project.

It is a multimillion project which we could not willy-nilly decide to invest into without the proper and adequate information.

Therefore, it was clear that YTS is fully informed that the appointment of the plaintiff as a consultant will only arise after we have entered into the joint venture agreement with Sepang Goldcoast project and not before.

He further testified as follows under cross-examination which I accept too with emphasis added:

Q: Pages 3 to 9 are basically email correspondences between Oxley and the plaintiff representative. Now I am just going to refer you a few emails. The first email if, you look at page 5 of Bundle J, you can see on the top, 'One ping, from Oxley Ping Ping Oxley,' sent to all the relevant parties on 30.01.2014, it says, 'Dear Mr Yap and team', it goes on and so forth. And then to the next page at page 6 under the heading 'Sepang', 'YTS to email. YTS is supposed to do some work', ok. This is your first reference. The second reference is at page 4 of the same bundle. Again if you look in the middle of that page at 'Ping had sent an email on 07.02.2014, 'Dear Mr Yap and team', you can see at the heading 'Sepang — any update on the mapping.' So my question to you, Mr Ching, looking at this email which is from Oxley, from your project team to the plaintiff, would you agree with me that Oxley had given instructions to the plaintiff to carry out these works which were what mentioned in the email. Agree or disagree?

A: For this question, I would like to disagree. The reasons being that we have to look at from the start how this project came about. It was brought to us by Mr Yap trying to convince Oxley it's a viable project. And then I will hand it over to Eric and team and Mr Yap would suggest that what he can produce out of this project to make it viable. And basically the project team will follow up with what he has said or informed of the viability of the project. Basically I am not surprised that they are following up with him because all this information need to be garnered and gathered so that we can make an informed decision whether this project is a viable one. *And for me and Yap, our understanding is very simple. He has many projects that he introduced to Oxley and basically, you know, all this project will be based on success basis because he claimed to be the consultant, the architects and he has a team of 200 over consultants with him. He claims that he can do many things to do submission and get permits. So since Malaysia is a new country that we invested into by Oxley, we do not know much about the planning culture of Malaysia. We depend on Mr Yap for his experience and expertise which he claims he had and hence I think we agreed that everything would be based on a success basis which means if let's say he can gather permit based on the plot ratio and the perimeter of the whole project which we think we can make profit and become viable, then we will formally engage him to further continue to do all the submissions. So this will give Oxley what we call in layman term 'a hatch' against, just in case, things don't work out to what he promised.*

Q: So Mr Ching, you had mentioned earlier of this success and basis arrangement.

Would you agree with me that there is nothing in writing or no confirmation from Oxley or communication from Oxley to the plaintiff that this arrangement would be on a success basis? Agree or disagree? — Nothing in writing on this success basis arrangement. I just need an agree or disagree, Mr Ching.

A: Yes. There is nothing in writing. *It's all oral* and —

Q: Thank you.

A: Can I proceed to explain or —

YA: Yes.

A: I can proceed. Thank you.

YA: What is it, Mr Ching?

A: Yes, thank you very much. *It's all oral and I would like to also explain that if the counsel is trying to tell me that it's all oral and it has of no use, I would like to also ask if there is no oral agreement of this nature about success basis, we would expect a lot of billings and invoices from the plaintiff himself (Mr Yap) and his company. It's because we have a gentlemen agreement with regards to all the projects that he has introduced us and try to be the consultant*. So we also need to see whether he has the necessary expertise to be able to get that kind of permit that of that kind of development that he thinks we can make money from. This is my explanation, My Lord.

[49] In the circumstances, I thirdly find that the second/third defendant from the beginning never committed to participate in the implementation of the project development unless and until they are satisfied on the commercial viability of the project. They were not keen but the plaintiff was eager and persistent; hence they participated along subject to contract. The second defendant subsequently set up the first defendant which executed the MOU with SGSB and SBSB that was subjected to the execution of a joint venture agreement if the implementation of the project by the first defendant is to go ahead. The first defendant's purpose of executing the MOU is to obtain further information for assessment of the commercial viability of the project.

[50] Fourthly, I find that the plaintiff as introducer of the project has instead been busy pitching and 'hard-selling' the project to the second/third defendants to have it implemented soonest. Accordingly, I find there has been an oral agreement reached between the parties that the plaintiff's involvement is on 'success basis' without charge unless and until the decision is made by the first defendant to implement the project. This is sensible in consonance with market reality and corroborated by the absence of any documentary evidence whatsoever on the appointment of the plaintiff to provide professional consultancy services. There is not even a letter of quotation sent from the plaintiff which would have otherwise been the norm. Simply put, the plaintiff agreed to assist in the first defendant's study into the feasibility of the project

pro bono. In the circumstances, there is therefore no agreement on the appointment of the plaintiff by conduct at all material times as that explained in *Ove Arup & Partners International Ltd and another v Mirant Asia-Pacific Construction (Hong Kong) Ltd and another* [2005] EWCA Civ 1585. The provision in cl 7(2) of the Third Schedule of the Architects Rules 1996 is also accordingly inapplicable. As to the handover of the memorandum of agreement of engagement of professional architect for architectural consultancy services dated 29 May 2014, I am mindful that there are rival contentions wherein PW1 testified that he handed over the memorandum of agreement to DW2 over a meeting but which is disputed by the first defendant. I however believed the first defendant's version based on the date of 29 May 2014 inserted and stipulated in the memorandum of agreement by the plaintiff itself. This is because there is no further meeting between them after 15 April 2014.

[51] In the premises, I fifthly find that the several meetings and WhatsApp messages which took place in December 2013 and January to April 2014 between the plaintiff and first defendant on the project focused on the plaintiff's provision of land title documents, market survey reports, coastal profile surveys and soil investigation reports of SGCB which are all geared towards the assessment of the commercial viability of the project. The discussion on this project in the meetings was minimal because there was also discussion on other projects of the third defendant's Malaysian projects. The plaintiff made preliminary design proposals to the first defendant amended from drawings and other documents already available from Coastal Paradise Development/SGSB which arose from suggestions of the first defendant on hotel rooms and sea view balcony as well as car-park zoning.

[52] Furthermore, I find that the first defendant's above communications and suggestions were made in the context of the oral agreement as found by me in para [50] above. Hence, they did not constitute instructions to the plaintiff in the capacity as the appointed professional construction consultant of the first defendant.

[53] Around the end of March 2014, I sixthly find that the first defendant was satisfied that the project is not commercially viable and has communicated to the plaintiff as such at their final meeting on 15 April 2014 which is re-confirmed by the first defendant's emails dated 21 and 29 April 2014 and 15 May 2014 in particular sent to the plaintiff. In addition, SGSB and SBSB jointly by letter dated 12 June 2014 wrote to the first defendant's solicitors that the MOU has been mutually terminated by reason that the joint venture agreement has not been executed within reasonable time.

[54] However, I also find that the plaintiff having known the first defendant's desire not to proceed with the implementation of the project thereafter continued working and produced to the first defendant project drawings dated 18 April 2014 as well as other project drawings dated 10 November 2014, 11 November 2014, 19 November 2014, 26 November 2014, 27 November 2014, 28 November 2014 and 2 December 2014. This action of the plaintiff smacks of lack of bona fides.

[55] Seventhly, I noted that the plaintiff in May 2014 claimed fees for architectural, civil and structural engineering, M & E engineering and quantity surveying services rendered up to approval of the master plan concept portion of the schematic design phase set out in the aforementioned plaintiff's unilateral memorandum of agreement and letters of confirmation of appointment. There has at all material times plainly been no agreement between the parties on the remuneration payable based on the phase/stage of services allegedly rendered by the plaintiff. Nonetheless upon my scrutiny of the evidence adduced before me, I find that there was no approval of the project master plan whatsoever by the first defendant. I further find that there is not an iota of evidence adduced of civil and structural engineering, M & E engineering and quantity surveying services rendered by the plaintiff up to that point in time. The services provided by the plaintiff so far seems to me to be recycling of its earlier master plan for the project prepared for Coastal Paradise Development/SGSB and furnishing of information as well as production of documents sourced from SGSB as requested by the first defendant to carry out its feasibility study on the commercial viability of the project.

[56] Consequently, I find that the plaintiff has at all material times only rendered some assistance to enable the first defendant to decide on the commercial viability of the project but this has been agreed to be done without charge as found by me in para [50] above. I am mindful that the plaintiff has alerted me that a registered architectural practice is prohibited by the Board of Architects from providing free professional services but this is my view solely a disciplinary matter between the architect and the Board of Architects.

[57] As the result, it is not necessary for me to delve into the rival contentions between the parties whether the plaintiff has the locus standi to commence this suit because the plaintiff's registration contravened the Architects Act 1967. Briefly and since the plaintiff has been registered as a multi-disciplinary practice with the Board of Architects pursuant to s 7B of the Architects Act 1967 at all material times, I find that the plaintiff is in principle entitled to provide architectural, civil and structural engineering, M & E engineering and quantity surveying services. It is therefore not appropriate for this court to review the correctness of the plaintiff's registration by the Board of Architect (including whether the plaintiff ought also to be additionally registered with

the Board of Engineers and Board of Quantity Surveyors) in this suit; see also *Weststar Construction Sdn Bhd v Prisma Athira Architect* [2017] MLJU 978; [2017] 9 CLJ 575. If any challenge on the same is to be mounted, this should be by way disciplinary proceedings taken against the plaintiff by either the Board of Architects, Board of Engineers and/or Board of Quantity Surveyors ('Boards') or public law judicial review. I also noted that the parties have not called any of the representatives of the respective Boards to enlighten the court on the practice and procedure particularly whether multiple registration is required in respect of multi-disciplinary practice. The cases including *Iris Corporation Bhd v S & J Partners Sdn Bhd* [2022] MLJU 518; [2022] 1 LNS 299 where the civil courts reviewed the issue of registration concerned unregistered professional plaintiffs practising architecture, engineering or quantity surveying that claimed for unpaid remuneration of services rendered.

CONSEQUENTIAL RELIEFS OF THE PARTIES

[58] Based on my finding in para [50] above, the first defendant is therefore not contractually liable to the plaintiff for its claims.

[59] I nevertheless noted that the plaintiff also prayed for damages to be assessed on *quantum meruit*. This is wrong *per se* because the basis of damages which is governed by s 74 of the Contracts Act 1950 and *quantum meruit* which is governed by s 71 of the Contracts Act 1950 is plainly different; see *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* [2015] MLJU 2161; [2015] 9 CLJ 1002 (CA) which also referred to the case of *Spatial Ventures Sdn Bhd v Twintech Holdings Sdn Bhd* [2014] 8 MLJ 38; [2013] 1 LNS 729 that held that reference to the contract scale or price is not a tenable basis to assess *quantum meruit*. In any event, I find and hold that the plaintiff is also not entitled to claim in *quantum meruit* for unjust enrichment by virtue of the oral agreement made between the parties as found by me in para [50] above. Moreover, it is not uncommon that the plaintiff's assistance is often seen and regarded as the 'loss leader' to its aspiration to be eventually appointed as the project consultant upon implementation of the project. This militates against any unjust enrichment as so made out by the plaintiff.

[60] As to the second to fifth defendants, I find that they are not liable to the plaintiff based on my findings in paras [32] to [41] above.

[61] Additionally, I further find that the fourth and fifth defendants are not liable to the plaintiff by reason that the first defendant has been dissolved pursuant to s 554(1) of the Companies Act 2016. It is provided as follows in the aforementioned s 554:

554 Effect of striking off

(1) Where a company is struck off from the register under section 549, the company shall be dissolved, but —

(a) the liability, if any, of every director or officer and member of the company continues and may be enforced as if the company had not been dissolved; and

(b) nothing in section 550 shall affect the power of the Court to wind up a company, the name of which has been struck off from the register provided that there is proof that the company has a property which can be realised.

(2) Where the Court issued a winding up order under paragraph (1)(b), the liquidator shall only be required to discover and realise any assets of the company.

I found so because the relevant assistance rendered by the plaintiff to the first defendant has been orally agreed to be done without charge and I reiterate para [50] above. The fourth and fifth defendants could not be liable if the first defendant is not liable. The timing of the dissolution of the first defendant is thus irrelevant too.

[62] Finally as to the defendants' counterclaim, I discern from their pleadings that they are principally based on breaches and misrepresentations by the plaintiff and PW1 concerning the plaintiff's registration pursuant to the Architects Act 1967. Based on my views and findings in para [57] above, these alleged breaches and misrepresentations have not been established. The plaintiff must be found liable by the Boards before the alleged breaches and misrepresentations are prima facie considered proved.

[63] In any event, I find that the defendants have also not cogently proved their alleged loss suffered; see *Tan Ah Chio & Ors v Lua Kim Soon & Ors* [2015] 1 MLJ 334; [2014] 1 LNS 1004. DW2 answered as follows at trial under cross-examination:

> Q: Now you talked about this loss of reputation and aggravated and exemplary damages. And in fact if you go to the last page, page 20 of your witness statement, you talked about the time and manpower expended, costs of travel and related expenses, loss of reputation, aggravated and exemplary damages. My question is would you agree with me, Mr Ching, that there are no documents in all these bundle of documents before the Court to show that Oxley had suffered these losses. Agree or disagree? No documents to show all these. Agree or disagree?
>
> A: I am not aware of, right.

CONCLUSION

[64] For the foregoing reasons, I hereby dismiss the plaintiff's claims as well as dismiss the defendants' counterclaims. There shall be no order as to costs.

Plaintiff's claim and defendants' counterclaim dismissed.

Reported by Ashok Kumar